not for me to judge as to their real value. But against that, the appellants' compass was no more to be commended upon. It was a portable set which unlike the Police's was not fixed to the boat and the appellants said the rocking of the boat would affect the reading. Unlike the Police compass it was not checked before but after going to the sea. I have no doubt that these facts would have affected the President's mind. The defendants produced a plan but if the compass was unreliable then it would follow that their map must also be unreliable. This fact would no doubt have also influenced the President's mind. It was said that the offence was not of strict liability and therefore it was necessary to consider whether all the crew besides the captain had the necessary *mens rea* that they knew they were in territorial waters. In my view the offence is one of strict liability. The words "found operating" clearly connotes an offence merely by the commission of the physical act of operating regardless of the mental element. This must be so and must be intended to be so by the legislature because otherwise it would be impossible to apprehend all except the captain in a boat for operating in territorial waters.

I do not think I need to say what I have already said regarding forfeiture in the case of *Juk De Sa* v. *Public Prosecutor*.[1]

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *P. Nadarajan & Co.*

WONG MUN KONG v. PACIFIC & ORIENT UNDERWRITERS (M) SDN. BHD.

[O.C.J. (Gunn Chit Tuan J.) February 25, 1977]
[Penang — Civil Suit No. 310 of 1975]

Damages — Leg injuries — Assessment of quantum — Liability apportioned at 75:25.

Negligence — Road Traffic — Statutory right of driver — Duty of care — Contributory negligence.

The plaintiff, a nineteen year old student, sustained leg injuries when his motorcycle collided into a motor car. He suffered the following injuries:—

(i) Fracture in the shaft of the left femur;

(ii) Swelling with deformity and tenderness in the left thigh;

(iii) Compound fracture of the right femur;

(iv) Two puncture wounds, one over medial and the other over the lateral aspect of the right thigh, and

(v) Loss of a right leg below the knee.

As a result of the accident, the plaintiff could not squat anymore and had difficulty in climbing steps. On the facts it appeared that the plaintiff had executed a U-turn without looking behind. If he had done so he would have seen the car, which had the right of way.

Held: (1) the statutory right of way of a driver must be used with due regard to the rights of others. Therefore, if a driver knows or ought to know that some other person by that person's fault is in a position of danger, the statutory right of way cannot be exercised without care being taken to avoid the consequences of that other's fault;

(2) the defendant should have in the circumstances of this case taken care to avoid the consequences of the plaintiff's fault. His liability should be assessed at 25%;

(3) the plaintiff by his foolish act in making a U-turn without looking behind him was guilty of contributory negligence and his culpability should be assessed at 75%;

(4) as general damages had been agreed at $40,000 judgment will be given for the plaintiff for $10,000 as general damages and $1,340 for special damages.

Cases referred to:-

(1) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49, 51.

(2) *London Passenger Board* v. *Upson* [1949] A.C. 155, 173.

(3) *Thompson & Thompson* v. *Jaeger* [1946] 3 W.W. R. 407; E. & E. Digest Vol. 36 para. 673, p. 99.

CIVIL SUIT.

Ong Eng Khuan (*Ong Chin Beng* with him) for the plaintiff.

S. Venugopal for the defendant.

Gunn Chit Tuan J.: The plaintiff in this case was a nineteen-year-old student at the time of the accident. On the 30th day of August, 1973, at about 12.30 a.m. he was riding a 100 c.c. Honda motorcycle with registration number PL 7269 along Gurney Drive, Penang, from the direction of Cantonment Road towards Northam Road. A collision occurred between his motorcycle and a motor car with registration number KC 6332, which was also proceeding along Gurney Drive towards Northam Road, when the plaintiff was making a U-turn towards Cantonment Road.

On the 8th day of July, 1975, the plaintiff filed a suit for damages for personal injuries and consequential loss against one Mukianto Kosasih who was the driver and one Madam Lim Ah Nya alias Lim Say Choo who was the owner of the said car. The writ of summons could not be served on either of them and on the 22nd day of January, 1976, the plaintiff obtained an order for substituted service to be effected on them by posting a copy of the writ and a copy of the order for substituted service on their last-known address as well as on the notice board of the High Court at Penang. Appearance was apparently entered for them on the 5th day of April, 1976, by a firm of solicitors, Messrs. Goh Lim Eam & Muttiah of Penang, but on the 17th day of May, 1976, a memorandum of change of solicitors was filed by R.K. Nathan & Co., a firm of solicitors in Kuala Lumpur, who also filed a statement of defence. The said firm of R.K. Nathan & Co. later filed a notice of motion on the 3rd day of September, 1976, together with affidavits affirmed by one Gary Mah, the Claims Executive of Pacific & Orient Underwriters (M) Sdn. Bhd., the present defendant in this case. My brother Justice Arulanandom who heard the said notice of motion was satisfied that neither the driver nor the owner of the car could be traced and that the plaintiff's claim in this case was one in which the judgment could be enforced against the present defendant under section 80(1) of the Road Traffic Ordinance, 1958, and made a consent order on the 1st day of November, 1976, that the present defendant be substituted in place of the driver and the owner of the car and be allowed to defend the action therein.

The case finally came before me for hearing on the 1st day of February, 1977. As expected, the

evidence which could be adduced in court was rather scanty. The plaintiff, who was called as a witness, told the court that he was familiar with Gurney Drive where there is a speed-limit of 20 m.p.h. At the time of the accident, which was just past midnight, the road was well-lit and there were not many vehicles on it. The accident took place at a spot near the second lamp-post shown in the photograph, marked Exhibit P1A. According to the plaintiff, the scene of the accident was quite near the junction of Gurney Drive with a side road called Burmah Lane. In his estimation the scene was approximately 30 feet from the said junction, but the police sergeant who visited the scene of the accident and prepared a sketch-plan with a key to it (Exhibit P3 and 3K) did not, unfortunately, observe whether there was any side lane near the scene of the accident and therefore did not show it on his sketch-plan.

At the material time there was no obstructions of any kind on the road near the scene of the accident. The road surface was good and the weather was fine. The width of Gurney Drive is 30 feet 6 inches and it is a straight and clear stretch of road without any corners to block one's view of traffic from either direction. In fact with the street lights on one could drive along the road in question without the headlights on. The plaintiff's recollection of how the accident happened was rather hazy but he claimed that he had looked in front of and behind him and did not see any traffic coming from either direction. Under cross-examination he stated that he was keeping to the centre of the whole road but added during re-examination that he had stopped his motor-cycle about two feet from the edge of the pavement before he made his U-turn. His statement under cross-examination that he had used his signals before turning was not challenged and I therefore found that he had switched on his trafficator; but it is inconceivable that if he had looked behind him first before making the U-turn, yet he did not, as he claimed, see any car. To my mind, and I so found that the plaintiff had only signalled with his trafficator and without looking behind him first had proceeded to make a U-turn. By the time he saw the car he was in the middle of the road and both he and his motor-cycle were hit on the right-hand side by that car. After the collision the plaintiff lost consciousness and when he came to he found himself lying on the grass verge on the right-hand side of Gurney Drive as one faces Northam Road.

The plaintiff had a pillion rider, a lady friend of about nineteen years old, when the accident occurred. She was in England and was not available in court as a witness and it was not disputed that in the circumstances no presumption against the plaintiff should be drawn by the court under section 114(g) of the Evidence Act, 1950. The defence called two witnesses, namely, Gary Mah, the Claims Executive of the defendant, and one Richard Lee, an insurance adjuster and investigator who was sent to visit the scene nearly two years after the date of the accident in order to investigate and write a report on it. Neither of them was obviously of any help to the court in determining how the accident occurred that day.

On the evidence adduced, counsel for the plaintiff urged me to conclude that it was most probable that the car in question had come out of Burmah Lane which joins Gurney Drive about 30 feet away from the scene of the collision. However it was in answer to a question in examination-in-chief that the plaintiff had stated that there was a hedge along Burmah Lane on the right-hand side as one approaches Gurney Drive (see Exhibit P1A) and he admitted under cross-examination that he did not see any traffic come out of that road. I therefore declined to conclude that the car in question had come out of Burmah Lane and that the plaintiff's vision was blocked by the hedge in question. In any case I was of the view and so held that the plaintiff did not look behind him before executing the U-turn, for if he had done so he should have seen the car in question.

Counsel for the defence pointed out that as the brake-marks were 27 feet long the speed of the car would be about 30 m.p.h. He contended however that the brake-marks did not lead to the stationary car shown in the sketch-plan and moreover the police sergeant had not recorded the width of that car and was unable to produce his diary. I, on my part, was satisfied on the evidence of the sergeant and the sketch-plan drawn by him, and so held that the brake-marks were made by the car in question which was travelling over the speed-limit of 20 m.p.h. for that road.

On the issue of the law of negligence, counsel for the defendant referred to the case of *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.*[1] and submitted that although the facts in that case were different from the present one, that Federal Court decision had ruled that a driver of a vehicle was only required to exercise reasonable care. It therefore cannot be disputed that a driver is not under a duty to be perfect in the sense of being able to anticipate other drivers acting in a negligent or irresponsible manner; but in the application of this principle to each case, the court must consider carefully the evidence to determine whether a driver has, or has not, failed to exercise ordinary care and skill. In the instant case, the surrounding circumstances would appear to justify the application of the following dictum of Lord Uthwatt in *London Passenger Transport Board* v. *Upson*[2] where His Lordship said: —

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

The above dictum was also referred to by Ong Hock Thye F.J. (as he then was) in the above-quoted Federal Court case where His Lordship said: —

> "... What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down."

In the present case, whilst bearing in mind that speed itself is not evidence of negligence, yet it is a factor which should be considered together with the fact that Gurney Drive is not a lonely country road but is a road within the city limits of Georgetown, Penang, where, for obvious reasons, a speed-limit of 20 m.p.h. has been imposed. The motor-cyclist had

his trafficator on, and whilst it is true that the motor car in question had the right of way and that the motor-cyclist should have looked behind him first before proceeding to execute his U-turn, yet the experience of motorists in this country should have taught the driver to foresee and anticipate a very common form of folly amongst young motor-cyclists and cyclists who often, even on roads within town board limits, make U-turns without looking in front or behind them.

As regards the duty of a driver having right of way, it has been held in the Canadian case of *Thompson & Thompson* v. *Jaeger*[3] that whilst the statutory right of way is of prime importance and must not be 'whittled away' yet it is a right which must be used with due regard to the rights of others. Therefore, if a driver knows or ought to know that some other person by that person's fault is in a position of danger, the statutory right of way cannot be exercised without care being taken to avoid the consequences of that other's fault. Similarly, in the circumstances of the present case, although the driver of the car in question had the right of way yet he ought to have known that the motor-cyclist, having switched on his trafficator, might be foolish or absent-minded enough to make a U-turn without first looking behind him. In spite of his right of way the driver of the car, who was driving within the city limits, should have exercised reasonable care and in this case I therefore found that the driver of the said car, who was travelling at a speed above the limit of 20 m.p.h., had not exercised ordinary care and skill and was negligent in that he had failed to keep a proper look-out or to observe in time the plaintiff's trafficator before the latter foolishly made a U-turn without looking behind him. In other words, the driver of the car should have in the circumstances of this case taken care to avoid the consequences of the motor-cyclist's fault. I assessed his liability at 25 per cent.

It was obvious that the plaintiff by his foolish act in making a U-turn after switching on his trafficator but without looking behind him was also at fault and therefore guilty of contributory negligence. He, too, has failed to use reasonable care for the safety of himself and ought to have foreseen that by his act he would have exposed himself to danger and hurt himself seriously. In my view the plaintiff was primarily to blame for the collision that day and I therefore apportioned his culpability at 75 per cent.

In the plaintiff's statement of claim he alleged that he had suffered special damages amounting to $4,643. But the only evidence adduced was a receipt and a bill (Exhibit P4 & P4A) to show that $890 had been paid by him for hospital charges for the period between December 22, 1973 to February 16, 1974. The receipt was produced by a clerk of the General Hospital, Penang, who had signed it. The receipt was in respect of a case with registration number 17252 and that registration number was referred to in the said bill issued in respect of the plaintiff. After hearing the evidence of the clerk and examining the said documents I was satisfied and found that the said bill was connected with the said receipt issued to the plaintiff. The plaintiff also claimed that he had spent $450 on an artificial limb. He did not produce any receipt for that item but his statement regarding this item of expenditure was not challenged by the defence during his cross-examination. All the other items of special damages were however challenged by defence counsel and the plaintiff did not prove them by adducing any other evidence. I therefore disallowed all the other items of special damages claimed and only awarded a sum of $1,340 for special damages in respect of hospital charges and an artificial limb.

As regards general damages it was already agreed that a sum of $40,000 would be payable if the defendant was found liable to pay for the driver's negligence. In the plaintiff's statement of claim he gave the following particulars of personal injuries: —

(i) Fracture in the shaft of left femur in the lower 1/3rd;

(ii) Swelling with deformity and tenderness in the left thigh;

(iii) Compound fracture of the right femur in lower 1/3rd;

(iv) Two puncture wounds one over medial and the other over the lateral aspect of right thigh;

(v) Loss of right leg below the knee.

The above injuries were not described in detail by the plaintiff, who during examination-in-chief said that as a result of the accident he could not squat anymore. He was fond of out-door life and played badminton before but could only walk about a mile and also had great difficulty in climbing steps now. There was no cross-examination regarding general damages and in view of both counsels' assessment, with which I agreed as to the quantum and my apportionment of both the plaintiff's and the driver's liability for the accident, I therefore gave judgment for the plaintiff in the sum of $10,000 as general damages and a sum of $1,340 for special damages. I also ordered the defendant to pay the plaintiff interest at six per cent in respect of general damages with effect from the date of service of the writ, three per cent in respect of special damages from the date of the accident and a quarter of his taxed costs.

Order accordingly.

Solicitors: *Ong Chin Beng & Associates; R.K. Nathan & Co.*